Supreme Court, U.S.
FILED
MAR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1176

In the Supreme Court of the United States

OCTOBER TERM, 1989

HORTON AUTOMATICS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supports the Board's conclusion that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging employees shortly before a Board-conducted representation election in order to prevent those employees from voting.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Horton Automatics, 286 N.L.R.B. No. 134 (1988)	3
Limestone Apparel Corp. 255 N.L.R.B. 722 (1981)	9
NLRB v. *Downslope Indus., Inc.*, 676 F.2d 1114 (6th Cir. 1982)	8
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983)	9
NLRB v. *United Bhd. of Carpenters*, 230 F.2d 256 (1st Cir. 1956)	8
Pioneer Drilling Co. v. *NLRB*, 391 F.2d 961 (10th Cir. 1968)	8
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	7, 8
Wright Line, A Division of Wright Line Inc., 251 N.L.R.B. 1083 (1980) enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)	9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3, 4, 5, 6, 7
§ 8(a)(3), 29 U.S.C. 158(a)(3)	3, 4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1176

HORTON AUTOMATICS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is unpublished, but the decision is noted at 884 F.2d 574 (Table). The decision and order of the National Labor Relations Board (Pet. App. 22a-23a), including the decision and recommended order of the administrative law judge (Pet. App. 24a-71a), is reported at 289 N.L.R.B. No. 57.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1989. A petition for rehearing was denied on October 2, 1989. Pet. App. 1a-2a. On December 2, 1989, Justice White extended the time within which to file a petition for a writ of certiorari to and including January 25, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, located in Corpus Christi, Texas, designs and manufactures customized automatic doors and related products. Pet. App. 4a, 25a. On October 9, 1986, the National Labor Relations Board notified petitioner that the International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, District 11 (the Union), had filed an election petition seeking to represent petitioner's hourly paid production and maintenance employees—approximately 105 employees. On October 30, the Board set a representation election for December 12, 1986. *Id.* at 5a, 24a.

On November 3 and 4, however, petitioner notified its bargaining unit employees of an impending temporary layoff, and explained that the "layoff would be instituted according to seniority, as provided in the Company handbook, and * * * that [w]hen work picks up again employees will be recalled . . ." Pet. App. 6a (internal quotation marks omitted; brackets in original). Several days later, on November 7, petitioner told ten production employees that they would be laid off effective November 10. And on November 26, petitioner notified all of the laid off employees in writing that they were fired as of that date. *Id.* at 6a, 27a.

2. The Board conducted the representation election, as scheduled, on December 12, 1986. Nine of the laid off employees cast ballots; petitioner challenged those ballots on the ground that the employees had been fired and had no reasonable expectation of being rehired. Pet. App. 6a, 27a-28a.[1]

On January 12, 1987, the Union filed with the Board unfair labor charges against petitioner alleging that the firm had engaged in specific violations of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), beginning in October 1986 and continuing beyond the date of the election. The Union further claimed that petitioner's November 10 "temporary" layoff and November 26 "permanent" layoff violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158 (a)(3) and (1). Pet. App. 7a, 24a-25a.

On February 20, 1987, the Board's General Counsel issued an unfair labor practice complaint based on the Union's charges. The complaint was tried before an Administrative Law Judge in March and May 1987. Pet. App. 7a, 24a-25a.

3. Adopting the findings and conclusions of the ALJ, the Board found that petitioner had violated Section 8(a)(1) of the Act by many coercive acts, including threatening employees with the layoff of union supporters and telling employees that they would not be recalled because of their union activities. Pet. App.

---

[1] Apart from the nine challenged ballots, petitioner's employees cast 43 ballots in favor of union representation and 43 ballots in opposition. *Horton Automatics*, 286 N.L.R.B. No. 134 (1988). As the court of appeals noted, "[t]he outcome of the election is still unresolved since the challenged ballots will determine the outcome." Pet. App. 6a n.2. The Board has decided not to count the challenged ballots until the final disposition of the instant case. See *ibid.*

23a, 28a-32a, 41a, 45a.[2] The Board found that petitioner had further violated Section 8(a)(1) by the following actions: changing plant rules and restricting employee mobility to prevent employees from discussing unionization, Pet. App. 32a-36a; forbidding solicitation of union support on non-work time, *id.* at 43a-45a; deliberately creating a confrontation with Union Representative Martinez in order to reduce employee support for the Union, *id.* at 36a-41a; interrogating employees about their union preferences and activities, *id.* at 41a-43a, 48a-49a; threatening employees that wage increases would end if the Union were certified, *id.* at 47a-48a; and predicting that the firm could take steps that "would do away with the Union," *id.* at 46a.

The Board determined that petitioner had violated Section 8(a)(1) and (3) of the Act by laying off and then firing ten bargaining unit employees during the election campaign because of their union activities.

---

[2] The Board found that in late October or early November 1986, Supervisor Elizalde told an employee that "a layoff [was] coming around because of union activities." Pet. App. 28a. The Board did not credit Elizalde's different version of the conversation. As the ALJ explained, "Elizalde was not an impressive witness. His recollection on cross-examination was selective and poor." *Id.* at 29a. The Board further credited another employee's testimony that Elizalde said that he doubted that petitioner would recall the laid off employees, and that the reason was "union." *Id.* at 30a. Again, the Board did not credit Elizalde's contrary testimony because his "demeanor and the full record evidence convince[d] [the Board that] he was not fully candid in his recall of this conversation." *Id.* at 31a.

The Board also found that in early November 1986, Superintendent Castillo "clearly conveyed to [employees] the message that the layoff was tied to their union activities." Pet. App. 32a.

Pet. App. 49a-64a. The Board found that petitioner knew about the laid off employees' support for the Union. *Id.* at 59a.[3] The Board also found that the previously documented violations of Section 8(a)(1), which petitioner's managers and supervisors committed both before and after the layoff, revealed the firm's strong anti-union animus. The Board thus concluded that the "timing of the layoff, which took place approximately four weeks before the Board-conducted election, coupled with the stated reasons for the layoff[,] convincingly demonstrate[d] [that petitioner's] motivation for having the layoff was to preclude these 10 known union supporters from voting in the * * * election." Pet. App. 59a; see note 2, *supra*.

The Board rejected petitioner's contention that the temporary layoffs "were brought about by economic necessity." Pet. App. 50a; see *id.* at 60a.[4] And the Board concluded that petitioner's asserted justification

---

[3] The Board specifically found that before the layoff, those employees had distributed union leaflets at the plant and had worn or displayed union insignia. Pet. App. 59a. And the Board found that petitioner "collectively, through President Hewitt, Plant Manager Carrier, Superintendent Castillo, and Supervisor Elizadle [*sic*] knew of their union activities." *Ibid.*

[4] The Board found that although petitioner had not met its projected sales in 1986, the firm's actual sales exceeded the previous year's figures. Despite that increase, petitioner had not expanded its work force. Pet. App. 60a-61a. The Board also determined that petitioner's hiring of replacement workers until shortly before the layoff undercut the firm's alleged concern with overstaffing. And the Board noted that petitioner's use of overtime had nearly doubled after the November 10 layoff, which "appears to explain how [petitioner] continues its normal production with 10 [fewer] employees." *Id.* at 64a n.55.

for making the November 10 layoffs permanent was pretextual. *Id.* at 64a.[5] As the Board explained, the evidence showed that petitioner's decision and November 26 announcement "that the layoffs were permanent came about as a result of [petitioner's] desire to preclude its laid off employees from voting in the 12 December Board-conducted election." *Id.* at 57a.

4. The court of appeals enforced the Board's order in an unpublished decision. Pet. App. 3a-21a. The court did not resolve whether petitioner's November 10 layoff was unlawfully motivated, since the court concluded that substantial evidence supported the Board's finding that petitioner had permanently laid off the employees on November 26 for discriminatory reasons, in violation of Section 8(a)(1) and (3) of the Act. Pet. App. 7a-8a, 12a. And in reaching that conclusion, the court determined that it was not unreasonable for the Board "to draw an inference of anti-union animus from the timing of the November 26 notice itself." *Id.* at 11a. The court noted that the record showed that petitioner's supervisors had seen some of the laid off employees distributing union leaflets, "that the layoff became an issue in the election[,] that [petitioner] feared that the outcome of the election would be close," *ibid.*, and that petitioner

---

[5] Petitioner contended that it sent the notification letters "not only so the employees would know they were permanently laid off but also to inform them they needed to obtain health insurance elsewhere and so they and particularly F. Gonzalez [a handicapped employee] would seek employment elsewhere." Pet. App. 56a. The Board rejected that explanation, noting, among other things, that petitioner had already told the employees that the layoff and recall would be governed by the firm's handbook and that their insurance coverage would lapse after 30 days. *Id.* at 57a.

"had never made permanent layoffs before November 26, 1986," *ibid.*[6]

ARGUMENT

1. Petitioner contends (Pet. 6-14) that in enforcing the Board's order, the court of appeals misapplied the "substantial evidence" standard of review. In *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), this Court stated that in evaluating the substantiality of evidence supporting the Board's findings, a reviewing court must "canvass[] 'the whole record'" and "take into account whatever in the record fairly detracts from [the] weight [of the supporting evidence]," *id.* at 488. In performing that function, "a court may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Ibid.* And the reviewing court must give particular weight to the credibility determinations of an "examiner who has observed the witnesses and lived with the case." *Id.* at 496.

Contrary to petitioner's sweeping submission, the court of appeals here properly applied that governing standard of review. See, *e.g.*, Pet. App. 7a. At bottom, petitioner argues (Pet. 7-11) that the court of appeals erred in considering whether substantial evidence supported the Board's findings concerning the November 26 permanent layoff, apart from whether

---

[6] After reviewing the record and deferring to the Board's credibility determinations, the court of appeals enforced the Board's order with respect to petitioner's various violations of Section 8(a)(1) of the Act. Pet. App. 12a-21a. The court did note that it might have resolved certain credibility determinations differently if it had authority to review the case *de novo*. See, *e.g.*, *id.* at 13a.

such evidence supported findings regarding the November 10 layoff. But even assuming petitioner had a valid economic reason for temporarily laying off the ten employees, the evidence amply supported the Board's finding that petitioner converted that action into a permanent layoff for an impermissible reason—to preclude the employees from voting in what petitioner expected to be a close representation election. And those two propositions are by no means inconsistent, particularly where, as here, "[i]t is uncontroverted that [petitioner] had never made permanent layoffs before November 26, 1986," Pet. App. 11a.[7]

Petitioner also suggests (Pet. 13-14) that further review is warranted because the circuits have used "conflicting standards" in applying *Universal Camera*. As this Court observed in *Universal Camera*, 340 U.S. at 489, the "precise way in which courts interfere with agency findings cannot be imprisoned within any form of words * * *. There are no talismanic words that can avoid the process of judgment." For that reason alone, the different verbal formulations adopted by various courts of appeals to describe that "process of judgment" do not reflect any substantive disagreement (or disarray, for that matter) requiring intervention by this Court.

---

[7] Petitioner also contends (Pet. 8-9) that, having rejected certain testimony relied upon by the Board, the court of appeals should have rejected other testimony of the same witnesses. But the courts of appeals have long agreed that a witness's testimony "need not [be] treat[ed] * * * as indivisible, for acceptance or rejection only as a unit." See, *e.g.*, *NLRB* v. *Downslope Indus., Inc.*, 676 F.2d 1114, 1116 (6th Cir. 1982); *Pioneer Drilling Co.* v. *NLRB*, 391 F.2d 961, 964 n.3 (10th Cir. 1968); *NLRB* v. *United Bhd. of Carpenters*, 230 F.2d 256, 259 (1st Cir. 1956).

2. Petitioner further contends (Pet. 14-16) that the court of appeals failed to apply the mixed-motive test announced by the Board in *Wright Line*,[8] and approved by this Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). Under the *Wright Line* analysis, where evidence before the Board shows that an employer's opposition to union activity was a substantial or motivating factor in his decision to take adverse action against an employee, the employer's action will be an unfair practice unless the employer establishes that he would have taken the action even if the employee had not engaged in protected union activity. *NLRB* v *Transportation Management Corp.*, 462 U.S. at 401-403. But in order for the *Wright Line* analysis to apply in a given case, the employer must advance—and the record must support—a legitimate, non-pretextual reason for adverse action. Where the Board finds that the employer's proffered reason is a pretext to disguise unlawful discrimination, the *Wright Line* analysis is unnecessary:

> [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.

Limestone Apparel Corp., 255 N.L.R.B. 722, 722 (1981); see also *NLRB* v. *Transportation Management Corp.*, 462 U.S. at 400 n.5.

Here, the Board found, and the court of appeals agreed, that petitioner's proffered explanation for the

---

[8] *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

November 26 firings was not credible. Since petitioner, on this record, did not show any legitimate motive for its action, petitioner necessarily failed to satisfy its burden of showing that the discharges would have occurred even without the demonstrated anti-union motivation. Thus the decision below is wholly consistent with the *Wright Line* analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

MARCH 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 821